Supreme Court, U.S.
FILED

971526 MAR 9 1998

OFFICE OF THE CLERK

No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

** CLASS ACTION **

Koichi Matsumoto and Yuki Kobayashi,
individually and on behalf of
all others similarly situated,
Petitioners,
vs.
James R.Gotcher, et al.
Respondents.

On Petition for a Writ of Certiorari to
the Court of Appeal of California,
Second Appellate District, Division One

PETITION FOR A WRIT OF CERTIORARI

Koichi Matsumoto and
Yuki Kobayashi
c/o Yuki Kobayashi
1469 S. Norton Ave.
Los Angeles, CA90019
Phone:(213)734-4815
Petitioners

October, 1997

QUESTIONS PRESENTED

The questions presented are:

1. Whether California Constitution is unconstitutional because it does not require notice, hearing and a reason for involuntary dismissal of an appeal, which is equivalent to affirmance of the judgment of lower court and thereby results in depriving appellant of life, liberty or property (money) without notice, hearing and a reason infringing the federal rights to due process of law, equal protection of law and access to the courts guaranteed by the Fifth and Fourteenth Amendments to the Unites States Constitution when a disadvantaged minority group of Japanese aliens involving 3,000 victims spread all over the world in a consumer fraud class action were denied appearance of their counsel in trial court, the action was dismissed by a legally disqualified trial judge without an opportunity to try the case on merits, and, upon appeal therefrom, again their appeals were arbitrarily dismissed for unknown reasons without notice, hearing, reasons or an opportunity to argue the merits of the appeals.

2. Whether California statute is unconstitutional because it automatically awards costs on appeal to respondent against appellant without notice, hearing and even a reason in the case of involuntary dismissal of an appeal, and, thus, infringes the federal rights of appellant to notice, hearing and a reason before depriving him of life, liberty or property (money) as guaranteed by the due process of law, equal protection of law and access to the courts under the Fifth and Fourteenth Amendments to the Unites States Constitution.

3. Whether a California state court may, consistent with the due process of law, equal protection of law and access to the courts under the Fifth and Fourteenth Amendments to the Unites States Constitution, grant a motion to dismiss an action as well as an appeal therefrom made by a party designated as "Individual Partners of Coudert Brothers" without identifying individual names.

[Other Respondents]

AKIKO MURATA
YUGO TOMITA
COUDERT BROTHERS
DAVID JACOBS
STEPHEN O. SPINKS
VANDER SCHUEREN
DAVID R. HALPERIN
THOMAS E. JONES
W.GAGE MCAFFEE
OWEN D. NEE
SOO YOUNG YEU
STEVEN R. BEHERRELL
COLIN D. LONG
BARRY METZGER
HUGH E. THOMPSON
RONALD W. BUCKLY
PETER D. CLEARY
DOUGLAS L.HALLETT
VICTORIA E. MARMORSTEIN
RAPLH C. NAVARRO
JHON A. ST. CLAIR
BARRYE L. WALL
RICHARD WALLACE
WENDY L. ADDISS
DOUGLAS R. ADEN
DOEL A. ADLER
STEVEN H. BECKER
THOMAS D. BRISLIN
PETER S. BRITELL
DOUGLAS F. BRODER
JEAN-FRANCOIS CARRERAS
PAMELA T. CHURCH
EDMUND S. COHEN
JEFFREY E. COHEN
JAMES C. COLIHAN
FREDERIC R. COUDERT
CHARIES H. CRITCHLOW
E.A. DOMINIANI
THOMAS J. DRAGO
JONATHAN D. DUBOIS
ROBERT L. ELSEN
JAMES R. ELSZNER
CAROLYN T. ELLIS
JONATHAN JACOBSON
PATRICK B. FENN
ROBERT S. FRANKLIN
ADAM FREMANTLE
PAUL D. FRIEDLAND
KEVIN W. GOERING
MICHAEL J. HAGAN
GERARD V. HANNON
ANDREW S. HEDDEN
S.L. HIGHLEYMAN
ELINOR R. HOFFMAN
STEPHEN HOGAN
ROBERT N. HORNICK
STEPHEN M. HUDSPETH
ANTHONY C. KAHN
ROSS KAUFMAN
FREDERICK P. KONTA
MARK D. LEBOW
DAVID H. MARKS
EDWIN S. MATTHEWS
MCAULIFFE E.TIMOTHY
JOHN N. MACBAINE
TIMOTHY J. MCCARTHY
JOHN E. MACDERMOTT, JR.
BRIAN E. MCGUNIGLE
MARVIN E. MILBAUER
TIMOTHY J. O'BRIEN
PAMELA G. OSTRAGER
KENNETH R. PAGE
KATHERYN C. PATTERSON
DARRELL E. PRESCOTT
WILLIAM RAND
RANKIN CLYDE E. III
REDWAY A. JAMES
RICHARD R. RELLY
SETH A. RIBNER
W. WARREN SCOTT III
NORMAN H. SEIDLER
GEORGE H. SHENK
JAMES B. SITRICK
GORDON B. SPIVECK
W. PRESTON TOLLINGER, JR.
STEPHEN M. VINE
CHARLES H. WAGNER
THOMAS J. WEBER
CHRISTOPHER M. WELLS
ELLEN R. WERTHER
ANTHONY WILLIAMS
JACQUES BUHART
ERIC M. CAFRITZ
WILLIAM LAURENCE CRAIG
JEAN-PATRICE DE LA LAURENCIE
JEAN-FRANCOIS. MERCADIER
H. VAN KIRK REEVES
CHRISTIAN SAIBAING
NICOLAS SOKOLOW
ROBIN TREVOR TALT
JONATHAN M. WOHL
DAVID S. FOSTER
RONALD S. KATZ
LILIAN K. NAKAGAWA
PETER G. PISTT
ANTHONY THEOPHILOS
GEORGE T. YATES, III
NORMAN P. GIVANT
BETSY E. BAYHA
ROBERT A. CHRISTOPHER
DENNIS R. DEBROECK
GLEG L. PICKRELL
JEFFREY LEOW
STUART RUBIN
WILLIAM J. GOUGH
MARK GROLMAN
ROBERT SEIDLER
LANCE J. MILLER
CHARLES R. STEVENS
MILO G. COERPER
RICHARD N. DEAN
MARK R. HERLACH
SHERMAN E. KATZ
ROBERT A. LIPSTEIN
DOUGLAS E. ROSENTHAL

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Petitioners Koichi Matsumoto and Yuki Kobayashi, jointly, respectfully petition for a writ of certiorari to review two orders of dismissal of three appeals and automatic award of costs on appeal without notice and hearing made by the Court of Appeal of California, Second Appellate District, Division One in this case.

28 U.S.C. Sec.2403 (b) may apply.

1. OPINIONS BELOW

The Court of Appeal of California, Second Appellate District, Division One, issued no opinion in dismissing three appeals of petitioners and automatically awarding costs on appeal against them [App., *infra*, 4A]. Nor the Supreme Court of California issued an opinion in summarily denying petition for review [App., *infra*, 2A].

2. JURISDICTION

The orders of dismissal of three appeals were entered on 9-16-97 and 12-18-97 [App., *infra*, 1A,3A] by the Court of Appeal of California, Second Appellate District, Division One. All appeals arose from the same underlying action between the same parties and involve substantially the same issues. On 12-10-97, the Supreme Court of California denied a petition for a discretionary review of the first dismissal of appeal [App., *infra*, 2A]. That court has not yet acted the petition for a discretionary review of the second dismissal of appeal, but the petition will be deemed denied by operation of law if the court fails to act by 3-27-98. The jurisdiction of this court is invoked under 28 U.S.C. Sec.1257 (a).

3. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

California Constitution Article 6, Secs.3 and 14 require oral argument, concurrence of two judges, and written reasons in a decision on appeal, but not in an involuntary dismissal of appeal [*People v Brown* 149 Cal.App.2d 175, 176 (1957)].

California statute, Rule 26 (a) of California Rules of Court, automatically awards costs on appeal to respondent against appellant without notice, hearing or

even a reason in the case of involuntary dismissal of an appeal.

4. STATEMENT OF THE CASE

The underlying lawsuit is an unprecedented, historic consumer fraud class action brought by a disadvantaged minority group of Japanese aliens involving estimated 3,000 victims spread all over the world and at least 2 million dollars actual damages against a large international law firm and its 125 partners and employees.

Taking advantage of the weakness of aliens, defendants-respondents deceived and defrauded these aliens, including petitioners, by advertising "99% success in getting green cards" in a green card lottery program with misrepresentation of and without full disclosure of material facts. When the green card lottery ended, virtually almost no one obtained a green card. By so defrauding aliens, respondents collected 2 million dollars or more from the aliens, and refused to refund any penny. These victims sought redress and justice according to the law of the United States in state trial court.

Employing the same tactics of deception with misrepresentation of and without full disclosure of material facts and law, respondents committed fraud upon trial court and successfully obtained a judgement of dismissal. One example was that respondents intentionally avoided service of process. For such purpose, respondents suppressed disclosure of individual names of partners, and appeared in trial court calling themselves as "Individual Partners of Coudert Brothers." In addition, respondents claimed that petitioner Yuki Kobayashi was a party to the action, and, so claiming, successfully obtained an order quashing the service of process made by Yuki Kobayashi. On appeal, respondents argued that Yuki Kobayashi was not and has never been a party to the action and thus could not be a proper appellant. By so arguing, respondents again successfully obtained dismissal of appeal.

Furthermore, the trial judge repeatedly denied appearance of petitioners' attorneys and, even after

having been legally disqualified, refused to recuse himself and granted motions to dismiss the action brought by "Individual Partners of Coudert Brothers" without identifying individual names. Thus, petitioners were deprived of the opportunity to try the case on merits.

Petitioners filed three appeals in the state Court of Appeal, each appealing a different judgment of dismissal.

In the Court of appeal, respondents continued to employ the same tactics of deception as in trial court by intentionally misrepresenting material facts and law.

Respondents, again calling themselves as "the Individual Partners of Coudert Brothers" without identifying individual names, moved to dismiss the appeal fraudulently claiming that appellant Yuki Kobayashi had no standing to appeal since he was not a party to the action below. The motion was properly denied.

In any event, appellant Kobayashi is and was an unnamed class member and unnamed plaintiff of this class action in trial court. Also, he was aggrieved at trial court's adverse judgments of dismissal, and moved trial court to set aside such adverse judgments. Appellant Kobayashi appealed such trial court's adverse judgments as an aggrieved party under Sec.902 of the Code of Civil Procedure, individually and on behalf of all others similarly situated. In addition, appellant Kobayashi is and was an agent and attorney-in-fact of co-plaintiff-appellant-petitioner Koichi Matsumoto in prosecuting the class action on his behalf, who is and was a named class member and named plaintiff in trial court.

After the unsuccessful motion to dismiss appeal, respondents again moved to dismiss the appeal arguing that this time somehow petitioners had failed to comply with the order of the Court of Appeal, failed to timely acquire record on appeal, had no standing to appeal, and so on. The fact of the matter was that the delay in preparing record was caused by the trial court not by petitioners. Petitioners were not in default and timely complied with the court order, which required them to re-designate the record on appeal and perfect the designation within ten days.

Meanwhile, the record was completed and the issue of

re-designation became moot. However, the respondents' tactics worked. Court of appeal arbitrarily dismissed the first appeal, and then the second and third appeals, without providing oral hearing, concurrence of two judges or a written statement of reasons. Thus, the reason for the involuntary dismissal was totally unknown and uncertain.

Again, petitioners were deprived of an opportunity to argue the merits of the appeals.

The Court of Appeal was the California state court of last resort in the civil appeal.

On 10-27-97 and 1-27-98 petitioners petitioned the Supreme Court of California for review of the two orders of dismissal of the three appeals raising the following federal questions:

1. California's procedures for involuntary dismissal of appeal do not pass constitutional muster [First Petition P.10; Second Petition P.9].

2. The court of appeal did not conduct meaningful and adequate review of the court record in dismissing appeal [First Petition P.11; Second Petition P.11].

3. The court of appeal was without jurisdiction to grant the motion to dismiss appeal brought by unidentified respondents "the individual partners of coudert brothers" [Second Petition P.9].

On 12-10-97 the state Supreme Court summarily denied a discretionary review of the first petition without hearing nor opinion.

On 1-13-98 a remittitur including automatic award of costs on appeal against petitioners was issued even though no award of costs had been noticed or heard by the court of appeal.

The second petition for discretionary review is still pending in the state Supreme Court. It will be deemed denied by operation of law if not acted on by 3-27-98.

The constitutionality of state statute Rule 26 is pending in the state Court of Appeal. The issue has not yet brought to the state Supreme Court. However, because the issue is closely related to and similar to the constitutionality of the state constitution involving the same parties and circumstances, it should be considered

together in this petition for judicial economy.

The federal questions sought to be reviewed by this Court relate to appellate proceedings in the state court of appeal as well as proceedings in the trial court, and were born when the state courts dismissed the action and three appeals without affording petitioners "a day in court." There was no other method of bringing the questions to the attention of the state courts.

5. REASONS FOR GRANTING THE PETITION

"A day in court" is a fundamental right under the Unites States Constitution. When such right is violated by both state trial court and state Court of Appeal despite petitioners' diligent and good faith efforts, it is necessary to settle this important question of law by this court.

This case involves very important public policy questions and other matters significantly affecting the administration of justice not only to the disadvantaged minority group of Japanese aliens involving 3,000 victims but also all other appellants in California and other states.

5.1. This Case Presents Important Unsettled Federal Questions That Should Be Settled By This Supreme Court

It has well been established that any state statute or constitution which may deprive a person of life, liberty or property without providing or requiring notice and oral hearing is unconstitutional [*Railroad Tax Cases* 13 F 722, 752-753 (D.California 1882); *People v Lawrence* 140 Cal.App.2d 133, 136-137 (1956), 295 P2d 4].

Both the California Constitution and statute in question do not require such notice and hearing while depriving appellant of life, liberty or property (money) in the case of dismissal of appeal [*People v Brown* 149 Cal.App.2d 175, 176 (1957)]. Therefore, they are unconstitutional and invalid.

The California constitutional provision requiring written opinions in deciding an appeal is designed to insure that the reviewing court gives careful thought and

consideration to the case and that the statement of reasons indicate that appellant's contentions have been reviewed and consciously, as distinguished from inadvertently, rejected [*People v Rojas* 118 Cal.App.3d 278, 288 (1981)]. However, this constitutional provision is said to not apply in dismissing an appeal [*People v Brown* 149 Cal.App.2d 175, 176 (1957)]. Therefore, under the California Constitution, the state court of appeal does not need to provide oral argument, concurrence of two judges, and written reasons in dismissing an appeal.

When a state court of appeal involuntarily dismisses an appeal, the effect is affirmance of the judgment of lower court, which results in depriving appellant of life, liberty or property (money) without notice, hearing and a reason infringing the federal rights to due process of law, equal protection of law and access to the courts guaranteed by the Fifth and Fourteenth Amendments to the Unites States Constitution.

Furthermore, the California statute automatically awards costs on appeal to respondent against appellant without notice and hearing in the case of involuntary dismissal of an appeal. Since the California Constitution does not require oral argument, concurrence of two judges, and written reasons in dismissing an appeal as discussed above, the real effect of the statute is to deprive an appellant of life, liberty or property (money) without notice and hearing. In depriving appellant of life, liberty or property (money), the court does not give or is not required to give any reason for it. These effects constitute clear violations of the due process of law, equal protection of law and access to the courts guaranteed by the Fifth and Fourteenth Amendments to the Unites States Constitution.

Moreover, this Court has determined that state court's denial of the one and only appeal of petitioner as of right was a violation of the due process right guaranteed by the Fourteenth Amendment [*Griffin v Illinois* 351 U.S. 12, 18 (1955)].

Similarly, a California court of appeal has determined that one who takes a timely appeal is entitled to perfect it, and a suppression of the exercise of that right amounts

to a denial of the equal protection of the law guaranteed by the Fourteenth Amendment to the federal constitution [*Agnew v Superior Court* 118 Cal.App.2d 230, 234 (1953)].

And, the Supreme Court of Missouri states that a party otherwise entitled to appeal who, by the construction of a statute, is prevented from doing so, where such right is given to all others in similar cases, is thus deprived of the right of due process of law [*State ex rel. J. Hahn Bakery Co v Anderson* 269 Mo 381, 190 SW 857, 858 (1916)].

This Court further determined that Due Process of Law protects against arbitrary action; Consequently, arbitrary action by the tribunal in the hearing of a cause or in its order violates due process [*Washington ex rel. Oregon R. & N. Co. v Fairchild* 224 US 510, 523 (1911)].

Furthermore, the Supreme Court of Illinois states that in order to develop and maintain a coherent body of law, it is imperative that reviewing courts set forth their rationale and discuss the relevant case law pertaining to the issues in a given case [*Siegel v Levy Organization Dev. Co.*, 607 N.E.2d 194, 199 (Ill 1992)].

In California, appeal from a judgment of a superior court to a court of appeal is as of right and is given to all. However, petitioners' appeals were arbitrarily dismissed by Court of Appeal for unknown reasons. If the California Constitution had required oral argument, concurrence of two judges, and written reasons as in any other decisions on appeal, such arbitrary dismissal could have been prevented and petitioners' right to appeal would not have been violated.

Another basic federal question presented is whether "Individual Partners of Coudert Brothers" without identifying individual names is a proper party to appear and move for dismissal of action or appeal, consistent with the due process of law, equal protection of law and access to the courts under the Fifth and Fourteenth Amendments to the Unites States Constitution. The complaint did not name "Individual Partners of Coudert Brothers" as a party to the action. Clearly, such designation was uncertain and insufficient enough to determine whether it meant the current partners or the

past partners, or which partners appeared and which partners did not appear.

These issues are extremely important affecting citizens of California as well as other states because every appeal is subject to arbitrary dismissal, and, when dismissed, appellant is automatically sanctioned with affirmance of lower court's judgment as well as imposition of costs on appeal without notice and hearing.

No prior case can be found on these important constitutional issues. The questions have not been, but should be, settled by this Supreme Court.

5.2 The Decisions of the State Courts are Erroneous

The dismissal by the Court of Appeal of the one and only appeal petitioners had as of right was very erroneous when they were diligently trying to perfect the appeal complying with all applicable rules and court orders, and were no way in fault. In fact, the trial court clerk has completed all record according to petitioners' re-designation of record. Respondents' claim that petitioners failed to comply with the court order was absolutely groundless.

Furthermore, involuntary dismissal of an appeal was a decision on merits and thus dismissal by a single judge without two concurrent judges and without a written opinion was erroneous.

Therefore, the decisions of the state court were very wrong indeed.

This Court should grant this petition to correct these errors of the state courts.

6. CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

March 9, 1998

Koichi Matsumoto and
Yuki Kobayashi
Petitioners In Pro Per

Court of Appeal-Second Dist.
Filed Sep 16, 1997, Joseph A. Lane, Clerk

In the Court of Appeal of the State of California
Second Appellate District, Division 1

Koichi Matsumoto, et al., plaintiffs/appellants,	) No.B107490) (SC No.B073320)
v.	) Order of state) court of appeal
James R. Gotcher, et al., defendants/respondents.	) dismissing appeal)

AMENDED ORDER

THE COURT:

Respondents' motion to dismiss is granted. The appeal filed October 4, 1996, only is dismissed.

SPENCER, P.J.

* * * * *

Supreme Court Filed Dec 10, 1997
Robert Wandruff, Clerk
Second Appellate District, Division 1, No.B107490

S065335
IN THE SUPREME COURT OF CALIFORNIA

Koichi Matsumoto,
Appellant
v.
James R. Gotcher,
Respondent

Appellant's petition for review DENIED.

GEORGE
Chief Justice

* * * * *

Court of Appeal-Second Dist.
Filed Dec 18, 1997, Joseph A. Lane, Clerk

In the Court of Appeal of the State of California
Second Appellate District, Division 1

Koichi Matsumoto, et al., plaintiffs/appellants,	) No.B107490 and) B109625
v.	) (SC No.B073320)) Order of state
James R. Gotcher, et al., defendants/respondents.	) court of appeal) dismissing appeal

We have read and considered appellants' motions, filed October 14, 1997, and December 2, 1997. The motions are denied.

We have read and considered respondents' motion to dismiss appeal no.B107490 and appeal no.B109625; the joinders thereto; and appellants' opposition.

Appeal no.B107490, filed November 12, 1996, and no.B109625, filed January 27, 1997, are hereby dismissed.

SPENCER, P.J. ORTEGA, J.

* * * * *

Court of Appeal of the State of California
For the Second Appellate District, Division 1

Yuki Kobayashi
1469 S.Norton Avenue
Los Angeles, CA90019

RE:Matsumoto, Koichi
vs.
Gotcher, James R.
2 Civil B107490
Los Angeles NO. BC073320
Judge:

* * REMITTITUR NOTICE * *

Notice is hereby given that the Remittitur has been issued this date and that the opinion, decision or order entered in the above entitled cause on 09/10/97 is now final.

* * Dismissal By Motion. * *

Respondent to Recover Costs.

JAN 13 1998 Joseph A. Lane, Clerk
By: S. Beaux, Deputy Clerk

* * * * *

Supreme Court, U. S.
FILED
APR 15 1998
CLERK

No. 97-1526

In The

Supreme Court of the United States

October Term, 1997

KOICHI MATSUMOTO, *et al.*,

Petitioners,

vs.

JAMES R. GOTCHER, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal, Second Appellate District, Division One

BRIEF IN OPPOSITION FOR RESPONDENTS JAMES R. GOTCHER, AKIKO MURATA AND YUGO TOMITA

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RESTATEMENT OF THE QUESTIONS PRESENTED

1. Do California's statutes, and the court rules duly promulgated thereunder, adequately protect the due process and equal protection rights of civil litigants whose appeals of right are involuntarily dismissed for failure to comply with a court Order.

2. Does a court Rule, promulgated in accordance with the Constitution and statutes of the State of California, which automatically awards costs to a prevailing Respondent, violate the due process and equal protection rights of a losing Appellant despite providing that Appellant with an opportunity to tax costs in a subsequent hearing conducted by the trial court.

PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding.

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STATEMENT OF THE CASE

The Petition grossly distorts the background of this case, in rectification of which these Respondents hereby submit a brief description of the underlying action and its appellate history.

In the late Nineteen-Eighties and early Nineteen-Nineties, Congress enacted a series of laws, each designed to confer Permanent Resident Status on aliens who could not otherwise meet the traditional requirements of the *Immigration & Nationality Act of 1952, as amended* [8 U.S.C. §§ 1101, *et seq.*]. The programs thus created were each identified by a unique visa symbol. There were, in sequence, the OP-1, the NP-5, three consecutive AA-1 programs and the on-going DV (or Diversity) programs. Each program was designed to take one of two forms: either a purely random "lottery" or a first-come-first-served registration.

The distinction between these programs was important because, while success in a random lottery reflected solely the luck of the draw, a first-come-first-served program was amenable to certain tactical considerations which could materially increase an applicant's chances of success.[1] For example, something as simple, and as basic, as knowledge o f postal handling procedures — information readily and publicly available in the Domestic Mail Manual — would enable an applicant to know when, where, and how incoming mail was supposed to be handled. With this information in hand, an educated guess could be made as to when, where and how many applications should be mailed to maximize an applicant's chances of success.

---

1. The raw odds of any given applicant being registered in the AA-1 program were 1,500:1. In the earlier OP-1 program, Respondent Gotcher succeeded, against those odds, in registering 348 out of 349 clients, using the techniques mentioned herein.

In enacting the AA-1 program, Congress made its intention crystal clear: it explicitly created a first-come-first-served program. The terminology actually used in the statute was quite specific: *"registration in chronological order of receipt."* This was a straight-forward formulation, and all interested parties understood from the beginning that in the AA-1 program Congress had, in fact, created a non-random registration procedure.

As matters turned out, however, affirmative misconduct, committed at the last minute, by two government agencies — the U.S. Postal Service and the State Department — improperly and unexpectedly altered the program; transmuting it from a first-come-first-served registration into a pure lottery. This unauthorized alteration was accomplished by the randomization of applications upon their receipt at the Merrifield, Virginia Post Office; the site designated by the State Department for receipt of registration applications.

At the behest of Congress, the General Accounting Office conducted a formal investigation and reported (GAO/NSIAD-92-166, May 1992) its findings to Congress and to the public. It found that the first AA-1 registration to have been defective, as described immediately above.

Petitioner Koichi Matsumoto was a client of Respondent Coudert Brothers, a New York-based, international law firm with branches in fourteen countries and twenty-one cities. He retained that firm to acquire Permanent Resident status for himself via the first of the three AA-1 Programs. The other Petitioner, Yuki Kobayashi, was never a client of Coudert Brothers.

Respondents James R. Gotcher, Akiko Murata, and Yugo Tomita were employed by Coudert Brothers throughout the

period that Matsumoto was a Coudert Brothers' client. They were employed, respectively, as staff attorney, secretary, and paralegal. Gotcher was never a partner in that firm nor, obviously, were Murata or Tomita.

Due, at least in some significant part, to the government's misconduct, Matsumoto was not registered in the first AA-1 Program.[2] A year later, acting through Kobayashi, he filed what purported to be a representative action. That action accused the Coudert Brothers partnership, along with 123 of its individual partners and former partners, and these three Respondents, of a long list of misdeeds purportedly related to his failure to be registered in that program. His Complaint sought recovery on behalf of a proposed Class of Plaintiffs to be composed of those former Coudert Brothers' clients who had also sought AA-1 registration and failed to receive it.

Having filed his action, he did nothing to prosecute it: he served no defendant, propounded no discovery, and made no motion for class certification. In short, he initiated no action whatsoever. He was completely inert until the trial court issued an Order to Show Cause Re Dismissal for failure to serve the Defendants. In response, Matsumoto had the case transferred to another Department (the Superior Court's "class action" department) on the ground that it was denominated "a class action." Having adroitly side-stepped this obstacle, he then let yet additional 1¾ years go by before he served these Respondents. For all practical purposes, then, the case remained dormant for just short of 2¾ years from the date of filing.

As the three-year, mandatory dismissal deadline approached, Matsumoto reactivated the action by serving these Respondents.

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2. After the randomization of the AA-1 applications, the raw odds of Petitioner Matsumoto being selected for registration rose back to approximately 1,500:1.

Thereafter, he unsuccessfully attempted to serve some of the other defendants. Service on each of those defendants was quashed as being either improper or untimely, or both. In the mean time, these Respondents had moved the trial Court for an Order dismissing the action as to them, in accordance with Sections 583.410 and 583.420(a)(1) of the *California Code of Civil Procedure*. That Motion was grounded upon the fact that Matsumoto's delay was un-excused and that it resulted in substantial harm. These Respondents averred, and the trial court agreed, that their defense was severely impaired, if not irreparably prejudiced, because Matsumoto deprived them of an opportunity to preserve evidence during the almost four year interval between the acts complained of and the date they were served.

Among the crucial matters mentioned by these Respondents was that at the conclusion of the AA-1 program, without the incentive of knowing that a lawsuit had been filed, the Respondents ceased to update their AA-1 client list. That would have become a critical element of their defense because such a list could have identified the particulars of each potential plaintiff's case; an important consideration inasmuch as at least three different retainer agreements were used, each having progressively stronger disclaimers. Furthermore, some clients had withdrawn their authorization for Coudert Brothers to represent them and had received partial or complete refunds; and, finally, Coudert Brothers offered — and some AA-1 clients accepted — to prosecute other forms of "green card" applications at heavily reduced fees. This information would have provided positive defenses for these Respondents.

Matsumoto never disputed the fact that these Respondents were served almost 2¾ years after the complaint was filed. He also never countered the Respondents' detailed recitation of the harm they suffered by virtue of his delay. The trial Court found that Matsumoto's delay in serving the Complaint was tactical

in nature, that the extent of the delay was egregious, and that, in view of the un-contested showing of harm to these Respondents, the excuses proffered by Matsumoto were inadequate. The Court granted the Respondents' Motion and signed an Order dismissing them from the Complaint; whereupon Matsumoto moved the Court to Vacate its Order. That Motion was also denied.

Finally, more than a month after the Complaint was dismissed as to these Respondents, Kobayashi attempted to intervene in this action via a Motion to Join which was predicated upon the purported assignment of a chose-in-action by a putative member of the proposed class. That Motion was denied.

His was never a credible motion because it wholly failed to meet the pleading requirements of a Motion to Join or a Motion to Intervene. Kobayashi used it to deliberately draw a denial, which he duly received, so as to be able to conflate his appeal with that of Matsumoto.[3]

Three appeals were filed in the California Court of Appeal: Matsumoto filed an appeal against his dismissal; Kobayashi filed an appeal against the denial of his Motion to Join; and Kobayashi and Matsumoto filed a joint appeal as to all other interlocutory decisions. Eventually, all these appeals were

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3. This hypothesis is eminently plausible because: (a) Kobayashi moved the California Court of Appeal for an Order consolidating his appeal with that of Matsumoto's (which Motion was denied); and (b) because Kobayashi has acted, de facto, as Matsumoto's attorney-at-law throughout this litigation, while disingenuously claiming to be merely Matsumoto's attorney-in-fact and, thus, able to represent Matsumoto in court in violation of *Drake v. Superior Court* (Div. 1, 4th Dist, 1994) 21 Cal. App. 4th 1826, 26 Cal. Rptr. 829 and Section 6125 of the *California Business & Professions Code*.

dismissed through Motions of the various Respondents on the grounds of the Petitioners' failure to comply with a July 16, 1997 Court Order requiring them, after a seven month delay, to re-designate the record on appeal and perfect the designation. Thereafter, Matsumoto filed a Petition for Review with the California Supreme Court — which was summarily denied for being untimely — and Kobayashi filed a similar Petition, which was also denied.[4]

REASONS FOR DENYING THE WRIT

I.

THE PETITION RAISES NO REAL FEDERAL OR CONSTITUTIONAL ISSUES.

These Respondents' Statement of the Case demonstrates that the bulk, if not the entirety, of the multiple, successive defeats suffered by the Petitioners in the California courts were self-inflicted. They were simply unable or unwilling to meet statutory, administrative, or court-imposed deadlines. As a result, no Respondent was ever required to answer the Complaint. These failures do not raise federal questions.

II.

THE PETITIONERS HAVE RAISED A FALSE CLAIM.

The Petition all but states (Question Presented #2, Petition p. i) that California laws do not permit opportunities to oppose costs awarded to a prevailing Respondent. This is flatly untrue:

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4. The foregoing recitation omits a number of pleadings, principally those associated with Kobayashi's *ad hominem* attacks on the bench officers involved in this case in the trial court and in the Court of Appeal.

and it is known by the Petitioners to be untrue. CRC Rule 26(d) specifically that *"A party may move to have costs taxed . . . as prescribed by rule 870(b)."* Each of the Petitioners has availed himself of this opportunity. They cannot now be heard to claim that they had no opportunity to oppose the award of costs on appeal.

III.

NO FEDERAL QUESTIONS HAVE BEEN DECIDED BY CALIFORNIA COURTS WITH RESPECT TO THESE PETITIONERS' ACTION.

Rule 10 of this Court's Rules provide guide lines for the acceptance of a petition for writ of certiorari. Subdivision (a) does not apply because this matter has never been before a United States court; subdivision (b) does not apply because the California Supreme Court has entered no decision in this matter except to deny review of the appellate decisions; and subdivision (c) does not apply because no California court involved in the Petitioners' proceedings has *". . . decided an important question of federal law that has not been, but should be settled, by this court . . ."*

IV.

THE PETITIONERS ARE BOUND BY THE LAW OF THE FORUM OF THEIR CHOICE.

The Petitioners assert (Petition, p. 2) that the proposed Plaintiff "class" consisted of Japanese aliens. Leaving aside the issue of the non-Japanese aliens who were potential class members,[5] the putative

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5. The potential class consisted of nationals of 22 countries. Although Kobayashi and Matsumoto had pretensions to represent the putative class, Kobayashi totally ignored the non-Japanese members of this potential class.

class, as a whole, consisted of non-resident aliens, thus providing complete diversity; and the amount in controversy well exceeded Ten Thousand Dollars. Therefore, the Petitioners might well have availed themselves of a forum in the United States District Court under the provisions of 28 U.S.C. § 1332(a). They chose not to do so.

Thus, it was their tactical choice that resulted in the application of California's statutes and rules of procedure.

Under the *Tenth Amendment* to the United States Constitution, the states are free to establish their own constitutions and enact laws thereunder.

In California, a Judicial Council was established pursuant to the provisions of *article VI, section 6 of the Constitution of California*, and was given various powers and responsibilities for the express purpose of improving the administration of justice. Each Rule of the *California Rules of Court* (CRC) was adopted by the Judicial Council under its constitutional authority to

> *. . . survey judicial business and make recommendations to the courts . . . adopt rules for court administration, practice and procedure, not inconsistent with statute, and perform other functions prescribed by statute . . .*

The constitutionality of the California Rules on the subject of appeals has been examined and held to be a valid exercise of the authority of the judicial council to adopt rules governing appellate procedure [Calif. Const. Art. 6, § 6, & *Millsap v. Hooper,* 34 Cal. 2d 192, 195, 208 P.2d 982 (1949)].

The rule [CRC 26(a)] which provides that a prevailing party is entitled to his costs as an incident to the judgment on appeal

is not unconstitutional. *See Harmon v. Pacific Tel. & Tel. Co.*, 201 Cal. App. 2d 453, 457, 20 Cal. Rptr. 118 (1962) to the effect that

> The contention that rule 26 is unconstitutional is likewise without merit. Pertinent is the following from *Rosenfield v. Vosper, supra*, 57 Cal. App. 2d 605, 610-611: "[H]is contention here overlooks the nature of costs. They are not a penalty imposed on the losing party for his misconduct: They are in the nature of incidental damages allowed to indemnify a party against the expense of successfully asserting his rights in court. [citations omitted] Costs are a part of the burden of litigation, and no litigant is deprived of a constitutional right by statutes which impose such costs upon him." [citations omitted].

V.

THIS PETITION IS FRIVOLOUS.

The trial court was convinced, based upon uncontradicted evidence, that this lawsuit was being prosecuted by Petitioner Kobayashi, and that Matsumoto was nothing more than his catspaw. Indeed, the evidentiary record in the trial court shows that Petitioner Kobayashi was using the underlying law suit as a tool in a vendetta against these Respondents. That record further shows that his fervor in pursuing this matter beyond all rationality results from his espousal of a highly unsavory racial theory which he and a tiny band of like-minded adherents seek to impose on others. The underlying action was without merit. Each of the various appeals was without merit, and this Petition is without merit.

CONCLUSION

For the reasons given above, the Petition should be denied.

Respectfully submitted,

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No. 97-1526

Supreme Court, U.S.
FILED
APR 15 1998
CLERK

In The

Supreme Court of the United States

October Term, 1997

KOICHI MATSUMOTO, *et al.*,

Petitioners,

vs.

JAMES R. GOTCHER, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal, Second Appellate District, Division One

BRIEF IN OPPOSITION FOR RESPONDENTS SPECIALLY APPEARING DEFENDANTS COUDERT BROTHERS, THE INDIVIDUAL PARTNERS OF COUDERT BROTHERS, BARRYE L. WALL AND RONALD W. BUCKLY

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PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding.

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STATEMENT OF THE CASE

This Petition for Writ of Certiorari arises out of Petitioners' multiple failures, spanning nearly one year, to perfect the appellate record. After filing on October 4, 1996 a Notice of Appeal from certain rulings by the California Superior Court dismissing this matter against Respondents for failure to properly serve process, Petitioners proceeded to miss all deadlines by which to perfect the appellate record set by the California Rules of Court, the Superior Court Clerk, and the California Court of Appeal. Finally, on September 10, 1997, the Court of Appeal dismissed Petitioners' October 4, 1996 appeal based on those failures and on December 10, 1997 the California Supreme Court denied review of the Court of Appeal's dismissal.

The complaint in this professional negligence lawsuit was first filed in January 1993 by Plaintiffs Koichi Matsumoto and Harumi Shokawa. However, nothing happened in the case until the end of 1995, when invalid attempts to serve Respondents were made. Respondents successfully moved the Superior Court to quash those attempts and the Superior Court denied Petitioners' numerous and frequent motions to reconsider those rulings, the orders dismissing the defendants who had been served, and the judgments dismissing this action.

Petitioners then sought appellate review of these decisions, filing Notices of Appeal on October 4, 1996, November 12, 1996 and January 27, 1997. On appeal, however, Petitioners failed to properly designate the record and to perfect that designation in case numbers B107490 and B109625 despite having received numerous opportunities to do so and extensive instruction from the Superior Court Clerk as to how to do so. Petitioners then unsuccessfully moved the Court of Appeal for relief from that burden and for criminal and civil sanctions against the Clerk based on the Clerk's alleged "bad faith" and

"incompetent" conduct. On July 16, 1997 the Court of Appeal ordered that

> each appellant has 10 days from the date of this order to re-designate the record on appeal and perfect the designation in case numbers B107490 and B109625. All other requests are denied.

Petitioners failed to comply with the Court of Appeal's Order. Based on that failure, Respondents Gotcher, Murata and Tomita moved the Court of Appeal for an order dismissing the October 4, 1996 appeal in which these Respondents joined. By its September 10 and 16, 1997 orders, the Court of Appeal granted that motion.[1] (Petition at 1A.) These Respondents then moved the Court of Appeal for an order dismissing Petitioners' November 12, 1996 and January 27, 1997 appeals based on Petitioners' same failures. By its December 18, 1997 Order, the Court of Appeal dismissed Petitioners' remaining appeals. Petitioners then unsuccessfully moved the Court of Appeal to reconsider its rulings and moved to disqualify based on alleged incompetence and bias of the appellate judges who had dismissed their appeals.

Petitioners next asked the California Supreme Court for review of the Court of Appeal's dismissals of their October 4, 1996, November 12, 1996 and January 27, 1997 appeals.

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1. The September 10, 1997 Order also inadvertently dismissed the November 12, 1996 appeal even though that appeal had not been the subject of the Motion to Dismiss. The Court's September 16, 1997 Order amended the September 10, 1997 Order to dismiss the October 4, 1997 appeal only. On September 29, 1997, Respondents, the Specially Appearing Parties, moved to dismiss the two remaining appeals, dated November 12, 1996 and January 27, 1997. On March 11, 1998, the Court of Appeal granted the Specially Appearing Parties' motion to dismiss those remaining appeals.

Plaintiffs' Petitions for Review were denied on December 10, 1997 (Petition at 2A.) and March 11, 1998. After Plaintiff's Petitions for Review before the California Supreme Court were denied, the Court of Appeal issued Remittitur Notices stating that Orders dismissing the October 4, 1996, November 12, 1996 and January 27, 1997 appeals were final and awarding Respondents costs.

The Court of Appeal's rulings were entirely justified. The law clearly states that it is the appellant's burden to timely perfect the record on appeal. Here, Petitioners, by their own failures, did not carry that burden despite receiving numerous notices from the Superior Court Clerk informing Petitioners what they needed to do to perfect the record and numerous extended deadlines to do so from the Clerk and from the Court of Appeal. Under well-settled and constitutionally valid California law, Petitioners are responsible for the consequences of their failure to perfect their appeal.

Try as they might, Petitioners cannot convert their simple, continuous failure to timely perfect the record on appeal into an issue that deserves further consideration by this, or any other Court. Their Petition for a Writ of Certiorari should be denied.

REASONS FOR DENYING THE WRIT

I.

THE PETITION RAISES NO FEDERAL OR CONSTITUTIONAL QUESTIONS.

As is evidenced by the Statement of the Case, this Petition does not raise any federal questions or constitutional issues. Petitioners' grievances concerning the dismissal of their appeals are based solely on their simple and continual failure to comply

with California statutes, Rules of Court, and finally, court rulings and orders. Contrary to Petitioners' unsupported assertions, it is long settled that the California Court of Appeal is not required to have a concurrence of two judges or to provide a written opinion when issuing an order dismissing an appeal. *People v. Brown*, 149 Cal. App. 2d 175, 176 (1957); *Funeral Directors Association v. Board of Funeral Directors*, 22 Cal. 2d 104 (1943). (Article IV of the California Constitution, which requires the Court of Appeal to provide a written opinion, does not apply to an order dismissing an appeal). Petitioners' appeals were thus dealt with according to clear-cut California law.

Again, Petitioners were provided several opportunities to comply with the California rules of court and the rulings of the Court of Appeal and Superior Court. Failing to so comply, Petitioners were then provided with an opportunity to explain their failures in their oppositions to Respondents' motions to dismiss and in Petitioners' motions for reconsideration. Despite these opportunities, Petitioners failed to present any justification for their failure to comply with the applicable rules of court and court orders. Instead, they shamelessly blamed their failures on court clerks, opposing counsel, and on the alleged bias of California superior court and appellate judges. Petitioners simply do not show how on this record they were denied due process.

II.

PETITIONERS ARE SOLELY RESPONSIBLE FOR THEIR FAILURE TO COMPLY WITH CALIFORNIA'S RULES OF COURT AND COURT ORDERS.

Petitioners argue that the decisions of the state courts were erroneous in that petitioners diligently tried to comply with rules of court and court orders. This argument is not reflected

by the factual record in this matter. In fact the factual record demonstrates exactly the opposite. As shown above in the Statement of the Case, Petitioners were solely responsible for their failures to comply with California Rules of Court and court orders and were not at all diligent in their attempts to comply with those rules of court and court orders. Their excuses below — that the Superior Court Clerk was incompetent and biased and that the Court of Appeal judges were incompetent and biased — were outrageous and nonsensical.

III.

PETITIONERS CANNOT VALIDLY CLAIM THAT THEIR APPEALS WERE DISMISSED FOR UNKNOWN REASONS.

As set forth repeatedly above, Petitioners' appeals were dismissed due to their continuous failure to comply with the California Rules of Court and rulings of the Superior Court and Court of Appeal. Petitioners were told by the Superior Court Clerk and the Court of Appeal what they had to do to perfect the appeals and were given several opportunities to correct their mistakes, but inexcusably failed to do so. As a result of Petitioners' failure to designate the record on appeal and perfect the designation within the prescribed time period, Respondents moved the Court of Appeal to dismiss the appeals and on that basis, Respondents' motions to dismiss were granted. In light of the Court of Appeal's specific instructions concerning Petitioners' deadlines to properly designate and perfect the record on appeal and Respondents' motions specifically naming those failures as the sole bases for their motions to dismiss, Petitioners cannot validly claim that they are not aware of the reasons underlying the dismissals of their appeals.

IV.

PETITIONERS' RIGHTS ARE NOT AFFECTED BY RESPONDENTS' USE OF THE TERM "THE INDIVIDUAL PARTNERS OF COUDERT BROTHERS" TO IDENTIFY PARTIES IN THIS LITIGATION.

Petitioners inexplicably claim that they have been denied due process in violation of the Fifth and Fourteenth Amendments of the United States Constitution because Respondents have included "the Individual Partners of Coudert Brothers" without identifying individual names. Petitioners further claim that "the Individual Partners of Coudert Brothers" is not a proper party to move for dismissal because the failure to name the individual moving partners created uncertainty.

Petitioners are wrong. Petitioners cannot seriously claim that they are unable to identify the individuals who they themselves sought to name as parties to this action in Exhibit A to their Complaint. In addition, these Respondents, in several motions and opposition briefs filed in the California state court, listed the names of the individual partners at issue. Respondents' occasional use of the term "the Individual Partners of Coudert Brothers" in lieu of specific names — as opposed to naming every person over and over again — was merely used in the interest of judicial economy and the conservation of paper and was not in any way intended to, and as shown above did not in any way, conceal the identity of any individuals.

More importantly, the identification of the names of the parties is irrelevant. Petitioners' case and appeals were dismissed because of their failure to comply with California law and court orders. The identities of the individual partners — about which, as shown above, Petitioners were clearly aware — has nothing to do with those issues.

V.

PETITIONERS MAKE SEVERAL OTHER INACCURATE FACTUAL ASSERTIONS.

A. Petitioners Falsely Contend That the Underlying Lawsuit Was a "Class Action."

No class action was ever certified in this matter and Petitioners know that.

B. Petitioners Falsely Claim That The Trial Judge Repeatedly Denied Appearances Of Petitioners' Attorneys And Refused To Recuse Himself After Having Been Disqualified.

Petitioners' allegations here are, quite simply, lies. The record indicates that the trial court never denied the appearance of an attorney for any party in this litigation. The trial court, however, did on occasion deny Yuki Kobayashi permission to appear because he was neither a party to the litigation nor was he a licensed attorney appearing on behalf of anyone. Even then, the Court was more than patient with Mr. Kobayashi and only did so after Mr. Kobayashi on several occasions had gone berserk in Court, once even comparing Judge Lachs to Adolf Hitler.

In addition, California Superior Court Judge Lachs was never disqualified in this action. Although Petitioners moved to disqualify Judge Lachs because they did not agree with his rulings — which was simply part of Petitioners' pattern of blaming Judges and other court personnel for any decisions that have not been in their favor — that motion was denied and Judge Lachs was not disqualified.

C. Petitioners Falsely Claim That Non-Party Yuki Kobayashi Is And Was A Class Member And Unnamed Plaintiff In This Class Action In Trial Court.

Petitioners' contention that Yuki Kobayashi is a class member and an unnamed plaintiff in this lawsuit is, again, a lie. Instead, his filings in the Court of Appeal state that he is the president of a non-profit corporation and is driving this case as a "service to society." He is, quite simply, a vexatious interloper.

As has been discussed previously, no class was ever certified in this litigation. Furthermore, at no point during this litigation has any Judge determined that Yuki Kobayashi was a party in this litigation. To the contrary, Superior Court Judge Lachs explicitly found that Yuki Kobayashi was neither a party to this lawsuit nor an attorney representing a party to this lawsuit. Further, Mr. Kobayashi was never a client of Coudert Brothers and therefore could not have suffered any of the alleged harm listed in the Complaint. Mr. Kobayashi moved to join the case as a plaintiff, but — not surprisingly given the fact that he never had the remotest connection to the facts of this case — his motion was denied.

D. Inexplicably, Petitioners Contend That All Delays In Preparing The Record On Appeal Were Caused By The Trial Court Not By The Petitioners.

As described in detail above, Petitioners have falsely contended that all delays in preparing the record on appeal were caused by the trial court. Although inaccurate, this contention is consistent with Petitioners' misguided and consistent pattern of blaming everybody but themselves for the mistakes they made during the course of this litigation. At various times, Petitioners have sought to disqualify trial court Judge Lachs and appellate Judges Spencer and Vogel, and to have court personnel,

including a Superior Court Clerk, criminally and civilly sanctioned. As described above, Petitioners — and no one else — are responsible for the dismissal of their case.

E. Petitioners Never Timely Complied With Their Deadlines.

Petitioners' contention that they are not in default of, and have in fact complied with, their deadlines is simply untrue. As set forth above, Petitioners failed to comply with the Court of Appeal's July 16, 1997 Order. Pursuant to that Order, Petitioners were required to designate the record on appeal and perfect the designation within 10 days. Inexplicably, however, they did not do so.

CONCLUSION

For the reasons set forth above, the Petition should be denied.

Respectfully submitted,

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